No. 47648-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent

v.

ROBERT OSTASZEWSKI,
Appellant.

REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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I.
RESPONSE TO CROSS-APPEAL

A. THE STATE MAY NOT APPEAL THE TRIAL JUDGE'S DECISION TO INSTRUCT THE JURY ON SELF-DEFENSE

The State filed a notice of cross-appeal in this case. In its brief the State "appeals" only one issue: the trial court's decision to instruct the jury regarding self-defense over the State's objection. This Court must deny this request because the State has no right to appeal the trial court's ruling regarding jury instructions.

The State's right to appeal is limited by RAP 2.2(b). *State v. Hawthorne*, 48 Wn. App. 23, 28, 737 P.2d 717, 720 (1987). That rule provides:

> (b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:
>
> (1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).
>
> (2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that (A) is below the standard range of disposition for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(6) Sentence in Criminal Case. A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

The State makes no argument that its cross-appeal fits under any of these provisions.

B. EVEN IF THE STATE COULD APPEAL THE JUDGE'S DECISION TO INSTRUCT THE JURY REGARDING SELF-DEFENSE, THE STATE'S ARGUMENT IS WITHOUT MERIT

To convict a defendant for first-degree assault, the State must prove that a defendant "intentionally" assaulted another. RCW 9A.36.021(1)(a). An act performed in self-defense negates the intent element of a crime and the State has the burden to disprove that a defendant acted in self-defense. *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). Use of force is lawful when "used by a party about to be injured ... in preventing or attempting to prevent an offense against

his or her person," as long as no more force is used than is necessary. RCW 9A.16.020(3).

The determination of the trial court of whether a defendant produces sufficient evidence to raise a claim of self-defense is a matter of law. *State v. Janes*, 121 Wn.2d 220, 238, n.7, 850 P.2d 495 (1993). In order to properly raise the issue of self-defense, there only needs to be some evidence that tends to prove that the allegedly defensive crime was done in self-defense. *McCullum*, 98 Wn.2d at 488; *State v. Arth*, 121 Wn. App. 205, 210, 87 P.3d 1206 (2004). To determine whether sufficient evidence was produced to justify the instruction, the trial court applies a subjective standard and views the evidence from the defendant's point of view as conditions appeared to him at the time of the act. *McCullum*, 98 Wn.2d at 488-89.

Significantly, the threshold burden of production of the evidence is low. The defendant is not required to present the evidence that would be sufficient to create a reasonable doubt. *Janes*, 121 Wn.2d at 237; *McCullum*, 98 Wn.2d at 488; *State v. Adams*, 31 Wn. App. 393, 396-97, 641 P.2d 1207 (1982). The defendant is entitled to the benefit of all the evidence presented in the case and not merely upon evidence presented through defense witnesses. For example, in the case of *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996), the Court held

that the defendant was entitled to a self-defense instruction based on evidence presented that was inconsistent with the defendant's testimony. In that case, the defendant did not recall striking a fatal blow, but other evidence gave rise to the inference that the defendant acted in self-defense. *Id.*

Here, the evidence was undisputed that Johannassen got out of his car and started towards Ostaszewski's van. Ostaszewski saw a knife. RP 637. As Johannessen approached, he said: "What the fuck are you doing taking pictures of me and my girlfriend." RP 638. Ostaszewski held up his hand and said "back away" three times. RP 639. He could see Johannessen had something in his hand but could not tell what it was. *Id.* According to Ostaszewski, Johannessen was "right upon me." RP 640. He looked like he was "on something." RP 641. Johannessen said:

> If you don't shoot me now, I am going to climb in there and beat the ever-living 'F' out of you.

RP 641. After that remark, Ostaszewski was afraid. RP 642.

Clearly the trial judge did not err in refusing to give the instructions.

II.
REPLY ARGUMENT

In this brief, Ostaszewski replies to only some of the State's arguments. This does not mean that Ostaszewski agrees with the State's

arguments on the issues he does not address. Rather, Ostaszewski believes that no reply is required because the State's arguments are not persuasive.

A. THE TRIAL COURT ERRED AS A MATTER OF LAW

A trial court's decision regarding a jury instruction is reviewed for abuse of discretion if it is based on a factual dispute. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court's decision based on a ruling of law is reviewed de novo. *Id.* To determine whether there is sufficient evidence to support giving an instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

An aggressor instruction is not favored and is only proper if there is credible evidence "from which a jury can reasonably determine that the defendant provoked the need to act in self-defense." The provoking act must be intentional. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The State argued in closing that Ostaszewski's act of taking pictures was the intentional act that provoked Johannessen's belligerent response. RP 863. There is no case in Washington approving the use of an aggressor instruction when the alleged provocation was taking pictures. But our courts have said words alone do not justify finding the speaker is

the aggressor. This is because the initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force. *Riley*, 137 Wn.2d at 912. And obtaining a restraining order is not a provocation justifying a first aggressor instruction. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011). Taking pictures in a public place simply did not justify Johannessen's aggressive approach of Ostaszewski and the threat to assault him.

> Photographs are routinely taken of people in public places, including at public beaches, where bathing suits are also commonly worn, and at concerts, festivals, and sporting events. Taking photographs of people at such public venues is not unusual, suspicious, or criminal.

See Arguellez v. State, 409 S.W.3d 657, 664 (Tex. Crim. App. 2013). Thus, the aggressor instruction was improper.

The State appears to argue that, because Johannessen did not have a visible weapon, a first aggressor instruction was necessarily appropriate. But Ostaszweski testified that the weapon was visible. And it is not Johannessen's foul language that is at issue, it is his threat to severely beat Ostaszewski simply for taking his picture. The State also opines that "the record is empty of any evidence of behavior by Johannessen that justifies being shot." But that is simply not true. As noted above, it was

Johannessen who approached Ostaszewski and threated to severely beat him.

Because an erroneous aggressor instruction effectively misstates the State's burden of proof, the error seldom will be harmless. *Riley*, 137 Wn.2d at 910 n.2; *Stark*, 158 Wn. App. at 960-961.

B. DRIVE-BY SHOOTING AND THE ASSAULT

The intent inquiry in regard to the "same criminal conduct" focuses on the extent to which the offender's "criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), *suppl.*, 749 P.2d 160 (Jan. 28, 1988). Although the statute is generally construed narrowly, the analysis does not focus on the mens rea element of the particular crime, but on the defendant's objective criminal purpose. 13B Wash. Prac., Criminal Law § 3510 (2015-2016 ed.). Thus, the Supreme Court held that simultaneous delivery or possession with intent to deliver two different drugs constitutes the same criminal conduct. *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993).

Bowman v. State, 162 Wn.2d 325, 172 P.3d 681 (2007), is not a "same criminal conduct" case. The analysis there had to do with a question of felony murder and the merger of two kinds of assault. But the Supreme Court has said that there is a distinction between the "same

criminal conduct" inquiry and the doctrine of merger. Both merger and "same criminal conduct" avoid double punishment for the same acts. But each does so in a different way. *State v. Collicott*, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992); David Boerner, Sentencing in Washington sec. 5.8(a), at 5-17 (1985); Joseph P. Bennett, Note, The "Same Criminal Conduct" Exception of the Washington Sentencing Reform Act: Making the Punishment Fit the Crimes, 65 Wash.L.Rev. 397, 398 (1990). Bowman, thus, has no application here.

For purposes of the same criminal conduct analysis, the question is not whether the same two crimes contain identical legal definitions of the "intent." The question is whether one crime furthered the overall criminal purpose. *Garza-Villarreal*, 123 Wn.2d at 49. Objectively viewed, Ostaszewski's intent was the same as to all of the shots fired. In his view, it was to protect himself.

The State's theory was that Ostaszewski intended to kill the victim. In fact, the State failed to distinguish in the amended information, CP 6-11 or in the jury instructions, CP 54-97, which act was the assault and which act constituted the drive-by shooting. There was no *Petrich* instruction and the State did not formally elect one shot as opposed to the other. Under the jury instructions, the jury could have found that the same shot constituted

both the first degree assault and the drive-by shooting. As a practical matter, then, these two counts involved the "same criminal purpose."

The State now makes the argument that, in closing, the State suggested a manner by which the jury might have allocated the gunshots. But that "election" was only the State's theory made briefly in closing. Argument is neither evidence nor a jury instruction. The State did not propose any special interrogatories asking the jurors to distinguish between the shots. Moreover, there was no evidence that anyone – other than Mr. Johannessen – was placed in substantial risk.

Finally, the affirmative defense instructions told the jury that Ostaszewski could have been acting in self-defense in regard to the drive-by shooting. Those instructions can only be understood in relationship to Johnannsen – the man who said "If you don't shoot me now, I am going to climb in there and beat the ever-living 'F' out of you" – and not as to some generalized risk to unidentified others.

Here, the State wants it both ways. It did not want to make an election because that would have limited the jury's consideration to which shot constituted the intent to kill, which one was the assault, and which was the drive-by shooting. Moreover, the State wanted to be able to leave the jury an out to convict Ostaszewski if the jury rejected the intent to kill or accepted that the first shot was in self-defense and the remaining two

shots were simply excessive force. Now, the State wants to argue that, in fact, it did make that election in order to avoid the application of same criminal conduct principles. This Court should reject those arguments.

DATED this 11th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, and by email where indicated, one copy of this brief on the following:

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